

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

SHORT HOP MOVING, INC.,

Respondent.

**Docket No. FMCSA-2008-0243¹
(Eastern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

On May 29, 2008, the Field Administrator for the Eastern Service Center, Federal Motor Carrier Safety Administration (Claimant) served a Notice of Claim (NOC) on Short Hop Moving, Inc. (Respondent).² The NOC, based on a May 14, 2008, compliance review, charged Respondent with one violation of 49 CFR 375.211(a), failure to participate in an arbitration program, with a proposed civil penalty of \$2,400; and one violation of 49 CFR 392.9a(a)(1)/14901(d)(3), operating without the required operating authority (household goods), with a proposed civil penalty of \$25,000. The NOC asserted a total proposed civil penalty of \$27,400.

After Respondent failed to respond to the NOC, Claimant served a Notice of Default and Final Agency Order (NDFAO) on July 7, 2008.³ The NDFAO advised

¹ The prior case number was MD-2008-0077-US1263.

² See Exhibit 1 to Field Administrator's Response and Opposition to Petition for Reconsideration (hereafter Claimant's Response).

³ See Exhibit 2 to Claimant's Response.

Respondent that the NOC would become the Final Agency Order in this proceeding effective July 14, 2008, with the civil penalty immediately due and payable on that date.

On July 14, 2008, Respondent served a Petition for Reconsideration. The petition was signed by C. Edward Hartman III, counsel for Respondent, who asserted that he unintentionally mis-calendared the file after Respondent brought him the NOC in early June 2008.⁴ Consequently, no reply to the NOC was submitted. Although Mr. Hartman claimed to have received a copy of the NOC, he asserted that the service date of the NOC was unknown and “it is unclear on what date the answer thereto was due.”⁵ According to Mr. Hartman, Respondent’s President has assured him that “he has and continues to refrain from taking any action that would be considered a continuation of the alleged violations.” Respondent contended that “the sole issue to be decided is the incidence of past transgression and what punishment is appropriate therefore, if any.”

In his Response to the Petition served August 6, 2008, Claimant contended that the Petition should be denied because Respondent failed to timely respond to the NOC and did not present sufficient grounds for vacating the Final Agency Order.

2. Decision

It is undisputed that Respondent did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a). Therefore, it defaulted. Under 49

⁴ Mr. Hartman attributed this error to an unspecified misunderstanding on the part of counsel.

⁵ Mr. Hartman’s uncertainty regarding the due date for serving a reply is somewhat puzzling. The NOC was dated May 29, 2008, and included a Certificate of Service stating it was served on that date. Pages 3 through 6 of the NOC clearly state that a reply must be served within 30 days of the service date. In this case, because the NOC was served by mail, an additional 5 days was added to the reply deadline pursuant to 49 CFR 386.8(c)(3). Consequently, the reply date was July 3, 2008.

CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent has not met its burden of demonstrating that the Final Agency Order should be vacated. Respondent's explanation for failing to respond to the NOC—that its counsel inadvertently failed to place the due date on his calendar—is insufficient to establish excusable neglect. Respondent had an obligation to ensure that a timely response to the NOC was filed and cannot excuse its failure to meet the deadline by ascribing it to inaction by its counsel.⁶ Consequently, I conclude Respondent has not established that its failure to timely reply to the NOC was due to excusable neglect.

Respondent's petition did not indicate whether it had any meritorious defenses to the violations charged in the NOC and, by stating that it has discontinued the alleged violations, Respondent essentially admitted them.

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if a respondent acts with due diligence in seeking relief. Although Respondent arguably acted with due diligence by filing its Petition for Reconsideration within a week after receiving the NDFAO, it would be an empty exercise or futile gesture to vacate the Final Agency Order if Respondent is unable to demonstrate a meritorious defense.⁷

⁶ See *In the Matter of Ray Hall dba Hall Logging*, Docket No. FMCSA-2007-28571, Order Denying Petition for Reconsideration, April 23, 2009.

⁷ See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration, October 8, 2008, at 5.

Therefore, the default stands and the Notice of Claim, including the proposed civil penalty assessment, is final. The essence of a default is a failure on the part of the motor carrier or driver to participate in the proceedings when required to do so.⁸ Having failed to participate in these proceedings within the time limit set by law, it is too late for Respondent to now be heard.⁹

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding.¹⁰

It Is So Ordered.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

1-7-10
Date

⁸ See *In the Matter of Parcel Shipper's Express, Inc.*, Docket No. FMCSA-2000-9523, Order, May 25, 2001, at 3.

⁹ *In the Matter of Kent Ness dba Ness Harvesting*, Docket Nos. FMCSA-2000-8111 and FMCSA-2002-11610, Order Denying Petitions for Reconsideration, March 15, 2002.

¹⁰ The July 7, 2008, NDFAO stated that the \$27,400 civil penalty was due and payable on July 14, 2008, the date that the NOC would become the Final Agency Order. Because Respondent petitioned for reconsideration on July 14, 2008, the clock on the effective date of the Final Agency Order was stayed by the petition. Therefore, the civil penalty is due and payable one day after the service date of this Order. Respondent should consult the NDFAO for payment instructions.

CERTIFICATE OF SERVICE

This is to certify that on this 8 day of January, ^{2010^{gm}}~~2009~~, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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